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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS MONTOYA VILLALPANDO,

Defendant and Appellant.

F055664

(Super. Ct. No. F07901713)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Alice Su, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Dennis Montoya Villalpando was convicted of various crimes arising from the home invasion robbery of his girlfriend's mother's boyfriend. On appeal, he contends (1) the trial court erred by failing to instruct sua sponte on the defense of claim of right, (2) the trial court erred by failing to instruct sua sponte on the lesser included offense of robbery, and (3) the jury's acquittal of defendant's codefendant resulted in inconsistent verdicts. We will affirm.

PROCEDURAL SUMMARY

On November 28, 2007, the Fresno County District Attorney filed an amended information charging defendant with home invasion robbery (also called robbery in concert; Pen. Code, § 213, subd. (a)(1)(A);¹ count 1) with an allegation of personal firearm use (§ 12022.53, subd. (b)); burglary (§ 459; count 2) with an allegation that another person, not an accomplice, was in the residence (§ 667.5, subd. (c)(21)); conspiracy (§ 182, subd. (a)(1); count 3); and assault with a deadly weapon (§ 245, subd. (a)(1); count 4) with an allegation of personal infliction of great bodily injury (§ 12022.7, subd. (a)). Defendant was tried with his codefendant, David Verdugo, who was charged with the same counts 1 through 3.

A jury found defendant guilty on counts 1 and 2, and found true the connected allegations, but acquitted him on counts 3 and 4. The jury acquitted Verdugo on all counts. Defendant unsuccessfully moved for a new trial, and the court sentenced him to prison for 13 years, as follows: a three-year term on count 1, plus a 10-year firearm use enhancement, and a one-year-eight-month term on count 2, stayed pursuant to section 654.

¹ All statutory references are to the Penal Code unless otherwise noted.

FACTS

The Basics

In 2006, defendant worked in his own auto body shop and lived with his girlfriend, Corina, in living quarters inside his shop. Attached to the shop was a main house, inhabited by defendant's roommate, "Mando."

Corina's mother, Priscilla, lived with her boyfriend, Aniceto, in Aniceto's house. Priscilla and Aniceto had been together for about seven years, and some of Priscilla's children lived with them. Corina had previously lived in Aniceto's house for four years and she considered Aniceto her stepfather. Defendant and Aniceto, however, had apparently not met.

Priscilla often took money from Aniceto and they had a rocky relationship. Early in the morning of December 2, 2006, with Priscilla's assistance, defendant entered Aniceto's house and robbed Aniceto of his wallet and revolver.

The Details

Aniceto testified that on October 31, 2006, Corina stole \$8,000 worth of jewelry from him. Aniceto went to defendant's house to retrieve his jewelry, but two young men answered the door and turned him away at gunpoint.

According to Corina, who testified under a grant of immunity, Priscilla wanted to steal money from Aniceto because he would not give her any money to rent an apartment. Priscilla called Corina and asked her if she knew anyone who might steal the money from Aniceto. She asked if defendant had any friends who could do it. One day, Priscilla came and spoke to Corina and defendant early in the morning. She banged on the door and woke them up. Defendant opened the door and Priscilla said she needed to talk to him. She brought breakfast and was particularly nice. She asked defendant if he had \$600 she could borrow. Defendant said he did not. Priscilla said Aniceto had money, but did not want to give her any. He kept his money in his work bag by the bed and her only chance to get it was when he was in the shower or when he was asleep. She said she was

afraid to take his money. Corina questioned why Priscilla would be afraid when she did it all the time. Priscilla asked defendant and Corina to help her get the money. Defendant said, "I don't think so because you ... talk[] a lot of shit[.]" Corina had previously told defendant not to listen to Priscilla because Corina did not trust her. Defendant told Priscilla he did not want to hear her proposal, but she kept talking about it. Corina refused, told defendant not to get involved with Priscilla, and told Priscilla to shut up and stop talking to him about it. When Corina told Priscilla to leave, Priscilla told Corina she missed her, loved her, and wanted her to come home.

On December 1, 2006, defendant's friend, Verdugo, nicknamed "Negro," spent most of the day in the main house with Mando and some girls. Defendant and Corina stayed in the shop most of the day, and later that night, Verdugo joined them in the shop.

Meanwhile, Aniceto and Priscilla were at Aniceto's house with Aniceto's nephew, Fernando; three of Priscilla's children, Richard, Felix, and Rachel; and one of Priscilla's grandchildren. After Aniceto had dinner with everyone, he went to his bedroom to watch television at about 10:00 p.m. Aniceto was refusing to let Priscilla sleep in his room to punish her. They had argued a few days earlier because Priscilla had taken about \$2,400 out of his wallet for a down payment on a car, which had already been stolen. Priscilla had taken money from Aniceto twice before. Aniceto told Priscilla she should call the police to report the stolen car, but Priscilla said one of defendant's friends had stolen the car and she was afraid of defendant because he was threatening her. Priscilla was attempting to rent an apartment, and Aniceto told her she could stay in his house until she moved.

When Aniceto went into his bedroom after dinner, his nephew, Fernando, was already in his room with the door closed. Everyone else was still watching television and talking in the living room. Aniceto watched a movie in his bedroom, then turned off the television around 1:30 a.m. He could hear everyone, including Priscilla and her friend, Naomi, still talking in the living room. When he heard the front door close, he got out of

bed, looked out the window, and saw Priscilla and Naomi leave the house and drive away in Priscilla's truck.

Although Aniceto usually locked the front door himself, he did not check it that night because other people were in the living room. But he did lock his bedroom door, as usual. He also slept with a .44-caliber revolver hidden under his blanket. He had bought the revolver a week earlier because Priscilla told him defendant was going to come and beat him up. Aniceto went to bed fully dressed, with his wallet in his pocket. He was not able to fall asleep until about 3:00 a.m., and he did not hear Priscilla return home.

Sometime after 4:00 a.m., defendant, Corina, and Verdugo got into defendant's truck, left the shop, and drove to Aniceto's house. Defendant told Corina, "Now would be a good time to go take the money[.]" Defendant asked Corina if he should do it and she tried to dissuade him, telling him not to believe Priscilla. Defendant told Corina to call Priscilla to see if she and Aniceto were home. Corina called and learned that both Priscilla and Aniceto were home. Defendant told Corina to ask Priscilla if she was going to leave the front door unlocked. Priscilla said she would leave the door unlocked and she only wanted \$600.

At Aniceto's house, Priscilla woke up the children sleeping in the living room and told them, "[L]et's go." Felix and Rachel saw defendant and another Hispanic man in the living room, both wearing dark hooded sweatshirts. Rachel did not know what was going to happen, but she was concerned about her son, so she took him and left. Priscilla rushed everyone out and took them to a motel, where she had already taken a room.²

² On December 14, 2006, Detective Andrews learned these facts from Felix and Rachel. Both of them identified defendant from a line-up as one of the two people who were at the house that morning. At trial, however, Felix did not remember telling the detective that he saw defendant and another Hispanic man standing next to the front door, or that he identified defendant to the detective. Felix testified that he and defendant were friends, and he denied seeing defendant in Aniceto's house the night of the attack.

Defendant stopped his truck a few houses away from Aniceto's house and told Corina to drive around the block. He said it would not take long. Defendant and Verdugo got out of the truck and Corina drove away. Verdugo took his gun, which Corina described as a small black handgun that she believed was a Glock. As Corina drove past Aniceto's house, she saw Priscilla getting the children out of the house, then she saw defendant and Verdugo enter the house.³

Aniceto was awoken by a blow to his side and then another blow that struck the top of his head and his wrist, which was near his head. He felt he was being hit with a hard metallic object. He opened his eyes and saw someone (not defendant) trying to turn on the light switch, which did not work. There were two people present, but only defendant came into the room. After Aniceto was hit, he heard the other man say something to the effect of "Are we going to kill him?" (or "[W]e kill him?" or "Do I kill him or do I leave him?"). Aniceto reached for his revolver, but defendant got it first. Defendant was then holding a gun in each hand. When Aniceto tried to get up, he fell to the floor. By this time, the lights were on in the room. Aniceto heard the hammer of his revolver click twice and heard defendant say, "[O]h, shit." Aniceto started to get up, but returned to a kneeling position when he felt a hard metallic object against the back of his

Similarly, Rachel testified that she saw the two men, but claimed she did not see who they were because she was focusing on getting her son out of the house.

³ Corina described these events during interviews with District Attorney Investigator Garcia on November 8, 2007, and with Detective Andrews. But, at trial, Corina testified that Verdugo asked for a ride home, and that she and defendant took Verdugo home and did not go to Aniceto's house. She denied telling the detective that they had gone to Aniceto's house. She said Priscilla called her while they were driving. Priscilla was intoxicated and had just gotten home. She told Corina that she and the children were getting ready to leave because Aniceto was "acting dumb with her" and had locked her out of his room. Corina denied telling the detective that defendant and Verdugo went inside Aniceto's house, and she drove the truck around the corner and back to the house.

head. Defendant told him, “[D]on’t move.” Aniceto thought the object was a gun, so he stayed still. Defendant pulled out Aniceto’s wallet (which contained paychecks for about \$800 and \$900, plus about \$2,500 cash) from his pants, walked around the bed, and grabbed a bag containing Aniceto’s work notebook and paperwork for his car. As defendant walked around the bed, Aniceto was able to see his face clearly. Aniceto had never seen him before. Aniceto could see that defendant was carrying a smaller gun, but he was no longer carrying Aniceto’s revolver. The other man, whose face Aniceto did not see, stayed in the doorway to the room.

Meanwhile, Fernando woke up to the sounds of blows and voices. He opened his bedroom door and saw Verdugo standing in Aniceto’s doorway, about six feet away. Fernando saw Verdugo’s face clearly. Verdugo held up his palm and told Fernando to stop. As Fernando stood in his doorway, he saw defendant come out of Aniceto’s room and give Verdugo the revolver. Verdugo held the revolver aimed at Fernando, and said, “Don’t move or I’ll shoot you.” Fernando heard Verdugo say to defendant, “[W]e kill him?” Defendant answered him in the negative. Defendant told Aniceto to turn around, and defendant and Verdugo left. Defendant was carrying Aniceto’s bag and Verdugo was carrying Aniceto’s revolver. Fernando did not see defendant’s face.

Aniceto wiped the blood from his head and noticed it was 5:07 a.m. He looked out the window and saw the two men running toward a truck with its headlights on. The truck made a U-turn and approached the men. Both men entered the truck on the passenger side. Fernando called 911.

According to Corina, when she returned from driving around the block, defendant and Verdugo were coming out of Aniceto’s house. Corina slid to the middle, defendant got back in the driver’s seat, and Verdugo got in the passenger seat. As they drove away, defendant and Verdugo talked about what had happened. Defendant said the front door was unlocked, but Aniceto’s bedroom door was locked, so defendant opened it. Verdugo entered the bedroom first and when defendant turned the lights on, Aniceto was on the

bed with a revolver. Verdugo grabbed Aniceto's arm, placed him in an armhold, and took the revolver away from him. Defendant grabbed the revolver and hit Aniceto on the forehead with it. Defendant grabbed a small bag next to the bed because Priscilla had told them Aniceto kept his money in the bag. Defendant drove back to his shop and he and Verdugo counted Aniceto's money. Corina heard them count \$2,000, which defendant and Verdugo divided. Verdugo put \$200 on the table and defendant put \$400 on the table, to make Priscilla's \$600 for her rent. Defendant then drove Verdugo home.

When the police arrived at Aniceto's house, only Aniceto and Fernando were in the house. Aniceto had not seen any of the children leave the house, and he did not know how the two men had opened his locked bedroom door.

The police found no signs of forced entry at the front door, the windows, or the bedroom doors. Aniceto told the police he believed Priscilla was involved because he had had problems with Corina.

Aniceto was taken to the hospital by ambulance. One of his injuries required 17 staples.

The next morning, defendant and Corina met Priscilla and the children at the Sonic drive-in. Priscilla hugged Corina and greeted defendant. While they ate breakfast, Priscilla and defendant had a discussion, and defendant gave Priscilla the \$600.

According to Aniceto, a few days later, Priscilla gave him part of his stolen wallet. A week or so later, when Aniceto was at Priscilla's apartment, he noticed a picture of Corina and defendant. Aniceto then recognized defendant as the man who had robbed him.

On December 6, 2006, Detective Andrews received a call from Detective Elizondo, who was working on the case of Aniceto's stolen jewelry. Detective Elizondo was with Aniceto and Priscilla at a pawn shop to identify Aniceto's jewelry. Detective Elizondo told Andrews that Priscilla wanted to talk to him about the robbery. Detective Elizondo brought Aniceto and Priscilla to headquarters, where Detective Andrews

showed Aniceto a photographic line-up that included defendant. Aniceto could not positively identify the perpetrator. The detective showed the same line-up to Fernando and he was also unable to identify the perpetrator. Verdugo was not in the line-up because Detective Andrews had not yet heard of his involvement.

On December 14, 2006, Detective Andrews interviewed Felix and Rachel. The detective showed Felix and Rachel the same line-up and they both identified defendant as one of the men in the house that morning.

Detective Andrews heard about Verdugo when Priscilla called him and said she had heard the “other guy” went by the nickname of Negro. Detective Andrews then looked up the nickname and found that a David Verdugo went by Negro and lived near Priscilla. Detective Andrews obtained a photograph of Verdugo.

On February 22, 2007, defendant was arrested during a traffic stop. The car he was driving contained a loaded Ruger nine-millimeter pistol on the passenger floorboard. The gun had eight rounds in the magazine and one in the chamber. Defendant admitted the gun was his and he had possessed it for about one year.

Defendant’s Confession

On February 26, 2007, Detective Andrews interviewed defendant after reading him his *Miranda*⁴ rights. At first, defendant said he was “supposed to” rob Aniceto, but he did not do it. He blamed Priscilla and said she was responsible, even though she was implicating him. He said, “Priscilla probably robbed [Aniceto] herself and tried to blame it on me.” When Detective Andrews said defendant was not being truthful, defendant replied that he did want to be honest. He said, “It was me. Pri[s]cilla came to the shop and asked me to come take this money from Aniceto.” Priscilla proposed the crime because she needed \$400 as a deposit for her apartment. She told defendant she had taken money from Aniceto before and had gotten away with it. She said he had more

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

money. She told defendant exactly what time to go, where to go, and where Aniceto's gun would be (in a bag under the bed). She said taking the money would be simple and Aniceto would not fight back. He would be asleep and would not even get out of bed. He slept in his clothes, kept his wallet in his back pocket, and locked his bedroom door. Defendant assumed Aniceto adopted these habits because Priscilla had robbed him so many times of his money and jewelry. She had even bragged about it and shared some of the loot with Corina and defendant. Defendant did not understand why Aniceto would carry so much money after Priscilla had robbed him repeatedly.

Defendant told Detective Andrews that on the night of the crime, he and Verdugo waited at the shop until Priscilla came to tell them it was time. She told defendant if he did not do it, someone else would do it that night. Defendant had never done anything like this, but he was desperate for money, so he agreed. Defendant, Verdugo, and Corina drove to Aniceto's house. Defendant knocked and Priscilla let him in. When defendant saw all the children in the house, he refused to proceed, but then Priscilla said she was taking the children out. Defendant thought the situation was strange. When he entered Aniceto's dark room, suddenly Aniceto was pointing a gun at him. Defendant did not expect Aniceto to be waiting for him with a gun. To prevent anyone from getting shot, defendant grabbed Aniceto's gun, then hit Aniceto with his nine-millimeter gun, which defendant had obtained about a year earlier for protection. Defendant did not want to hit Aniceto, but he thought Aniceto was going to shoot him. Aniceto kept fighting even though defendant told him to give him his wallet and everything would be okay. Aniceto would not relinquish the wallet, so defendant took it out of Aniceto's back pocket. Defendant saw Aniceto's relative inside the house and told him to stay in his room. Defendant took the gun and the wallet, then he and Verdugo left. Corina was waiting in the truck outside. Corina knew about the plan to take the money, but she did not know things would occur as they did.

When defendant and Verdugo got back in the truck, Verdugo took Aniceto's wallet from defendant. Back at the shop, defendant got \$800 from the wallet. Defendant did not know what happened to the wallet.

Later that morning, defendant and Corina met Priscilla at the Sonic drive-in. Defendant gave Priscilla \$400 out of his \$800 share. Defendant said the other people split the rest of the money. Corina did not get any of it; she just went along because she went everywhere defendant went. Defendant explained that Priscilla was going to have him commit the crime alone because she knew he did not like Aniceto, but she sent Verdugo with him, probably to make sure defendant did not lie about the money.⁵

The Defense

Defendant

Defendant testified on his own behalf. On December 19, 2005, someone stole a car from the front of his body shop. He learned that a person nicknamed "Snakes" was blaming him for the theft. Defendant defeated Snakes in a fist fight, but Snakes came to defendant's shop and shot him in the shoulder. From that point, defendant always carried a gun for his protection.

Defendant had known Corina for about two years. Defendant did not get along with Priscilla because of how she treated her children. In 2006, Priscilla came to him and asked if he could help her obtain a car. Defendant did not want to get involved with her, but he agreed as a favor to Corina. He knew someone who wanted to sell a Honda for \$1,500, but it would require \$600 worth of work to get it running. Priscilla paid defendant \$400 for the engine work and said she would pay the rest in the next two days.

⁵ Corina testified that defendant wanted to meet everyone for breakfast at the Sonic drive-in so Corina could see her relatives. Priscilla was crying because of what had happened to Aniceto. Defendant asked her why she was crying when she had talked about stealing from him. Defendant did not give Priscilla anything at the drive-in.

She told him Aniceto would pay for the car. The seller of the car said he would repossess the car if Priscilla did not pay for it in time and she would lose her \$400.

The next day, Priscilla and Corina brought defendant some of Aniceto's jewelry as a down payment to hold the car. That night, when defendant was gone, Aniceto came to defendant's house and demanded his stolen jewelry from defendant's friend. When defendant heard that Aniceto claimed the jewelry was stolen, defendant gave the jewelry to Corina and told her to return it to Aniceto. Defendant did not want anything to do with stolen property. Priscilla said Aniceto would pay for the car. Priscilla had no job, so her only source of money was Aniceto, as far as defendant knew. When defendant realized Priscilla was not going to pay him, he decided to approach Aniceto himself. He went twice to Aniceto's house about a week before the robbery, but did not speak to Aniceto. Priscilla answered the door and she refused to wake Aniceto up.

Defendant knew Verdugo as a "mutual friend." Verdugo formerly worked at defendant's shop, then started spending time with the girls in the main house, where defendant's roommate lived.

On December 1, 2006, at about 1:00 or 2:00 a.m., Priscilla, who had been calling repeatedly, showed up at defendant's house. She said she was fighting with Aniceto and she needed to move. Aniceto was not giving her the money he had promised for her apartment and she thought he owed her money for taxes. She was going to use Aniceto's money to pay defendant for the car and to pay for her apartment. Priscilla wanted defendant to rob Aniceto of the money that he refused to give her. She said it would be very easy and there would be no problems. Defendant knew Priscilla had a drug problem and he thought she was under the influence every day. He told Corina, "Get your crazy mom out of here."

Later that day, Verdugo came into defendant's living quarters to greet him, then returned to the main house. The next morning between 5:00 and 6:00 a.m., Verdugo knocked and asked if defendant would take him home. Defendant agreed, so he, Corina,

and Verdugo left in defendant's truck. Defendant had his gun, as always. On the way, Corina received a call from Priscilla, who said she and Aniceto were fighting and the children were crying. Corina told defendant her family was having problems and she asked him if they could stop at Aniceto's house and get Priscilla out. Reluctantly, defendant stopped in front of the house. Aniceto's vehicle was there. Defendant told Corina and Verdugo he would be right back, and he knocked on the door. When Priscilla opened the door, she was crying hysterically and defendant could see that she needed to leave. Defendant told her to leave and go to a hotel, but she refused to leave without her money. Finally, defendant agreed that he would speak to Aniceto and get her money for her. He told her to leave with the children.

When defendant went to Aniceto's bedroom, the door was open. Aniceto was fully clothed, sitting on the bed, and pointing a gun at him. Defendant yelled, "He's got a gun," and he leapt for the weapon. He grabbed Aniceto's hand and gun with his left hand, and the gun's hammer got caught on his hand. Defendant believed Aniceto would have shot him otherwise. Defendant hit Aniceto on the head with something. The blood upset defendant. He told Aniceto, "Don't move. Everything will be okay." He asked Aniceto where Priscilla's money was and Aniceto said it was in a wallet. Defendant took the wallet, and left the room with Aniceto's wallet and gun. He did not walk around the bed. He did not have his own gun in his hand and he did not remember drawing it. As he left, he was surprised by Fernando. Defendant told him to stay in his room and defendant left. Defendant did not see Verdugo inside the house; Verdugo and Corina were waiting in the truck. Defendant drove back to his shop.

Defendant and Corina went to their living quarters and Verdugo returned to the main house. Defendant did not know what to think. He had been surprised to find Aniceto pointing a gun at him. He wondered if Priscilla had set him up and tried to kill him. Defendant had gone to Aniceto's to help Priscilla and the children. He was upset because he was forced to hurt someone to save his own life.

The next morning, Priscilla called and said she wanted the money. Defendant and Corina met her at the drive-in. Defendant did not know what happened to Verdugo, and he was too upset to care. Defendant told Priscilla he got the money from Aniceto, but “in the process of ... almost getting killed [he] had to beat [Aniceto] up.” Defendant gave Priscilla about \$1,000. Defendant felt that the children needed a place to live.

Defendant continued to work at his shop every day. Priscilla got an apartment, but she and Aniceto continued seeing each other as though nothing had ever happened. Defendant did not think he had committed a crime and he knew nothing about an investigation.

One day, when defendant was pumping gas at a 7-Eleven, the brother of Snakes (who had shot him the year before) approached him and lifted his shirt to expose his gun. He told defendant he had not forgotten him and was still coming for him. He laughed and walked away. A few days later, the same person drove into defendant’s shop and started firing. Defendant grabbed his gun and started firing back. The person put the vehicle in reverse and kept shooting. He drove away and no one was hit.

At about 4:00 a.m. the next morning, defendant was about to lie down when he saw the same vehicle on his surveillance camera. He jumped up, got dressed, grabbed his gun, and ran through the shop and into the main house. By the time he got there, shots were being fired into the house. Defendant returned fire, using a full magazine, but he did not leave the house.

On February 22, 2007, defendant was arrested after a traffic stop. When he was stopped, he told the officers he was armed and he was going to lay his firearm on the floorboard. He was arrested for murder, but Detective Eaton told him not to worry, it was self-defense, and he would be out of prison in six months.

When Detective Andrews interviewed him on February 26, 2007, defendant initially assumed the interview pertained to the homicide. But Detective Andrews told him he knew all about the home invasion robbery and he knew defendant had done it.

Defendant did not even know the meaning of home invasion robbery. Detective Andrews told defendant there was a difference between the time he would serve for a homicide and a home invasion robbery. Detective Andrews told defendant he would get a lesser charge if he cooperated with him on the home invasion robbery. He said, “You’re looking at homicide, and you’re looking at 25. You’re looking at 25 to life.” Then he said, “Don’t worry about it, if you agree to this home invasion.” Detective Andrews assured him that he would receive a lesser charge if he cooperated. This discussion, which was not on the tape or transcript, occurred before Detective Andrews left the room, presumably to turn on the tape. (Defendant did not know the interview was being taped.) Defendant felt that he would spend the rest of his life in prison if he did not agree that he had committed the home invasion robbery. He had believed Detective Eaton, but he was no longer in the picture and defendant felt he had to deal with Detective Andrews.

Defendant agreed with everything Detective Andrews stated had happened. He explained to the detective, “Okay. If that’s what I need to do, that’s what I need to do.” But he also told the detective that it was not a robbery; it was just something that turned out badly. He said he did not do robberies; he just went to the house to help some family members. Detective Andrews asked him leading questions and defendant followed his direction. Defendant was eager to agree to the home invasion robbery if it meant he would not have to spend the rest of his life in prison.

On cross-examination, defendant testified that when he left Aniceto’s house, he believed Priscilla had set him up to be both robbed (she would not have to pay for the car) and killed.

Defendant testified he did not like Priscilla and he did not get along with her. The \$400 she paid him was for engine work on the car. He was going to cover the \$1,500 for the car, and the stolen jewelry Priscilla and Corina brought to him was for that \$1,500. He put the jewelry in a safe, but told them to give it back to Aniceto when he heard it was stolen.

Defendant said he commonly worked odd hours and went to bed late. The morning of December 2, 2006, he woke Corina up to go with him to take Verdugo home because he did not normally leave her at home and he wanted to eat breakfast with her. Defendant loved breakfast; he was a breakfast person, although he did not usually eat breakfast at 4:30 a.m. Defendant estimated that Aniceto's house was about five minutes from the shop and Verdugo's house was another five minutes from there. After leaving Aniceto's house, defendant did not take Verdugo home even though his house was only five minutes away and the whole purpose of the trip was to take Verdugo home.

When he arrived at Aniceto's house on December 2, 2006, defendant parked at the curb directly in front of the house and told Corina and Verdugo, "I'll be right back." Aniceto's van was there and Priscilla's car was parked on the lawn. Inside, the children were crying. Defendant could not explain why Felix and Rachel testified that they had not seen him at Aniceto's house that morning. He did not sneak into the house and he was not hiding. Priscilla was crying about the money she needed for her rent and the things she did not want to leave behind. Defendant told her to leave the money and the things, and just leave. He told her to get it over with and just leave Aniceto. But Priscilla was stubborn. She kept saying she did not want to leave without the money. Defendant reassured her he would ask Aniceto for the money if she would just leave.

When Priscilla and the children left, defendant assumed he was alone in the house with Aniceto. He turned and walked three to five feet toward Aniceto's bedroom. The bedroom door was open and Aniceto was sitting on the edge of his bed only about five feet away, pointing a six-shot revolver at him. Defendant yelled out, "He's got a gun," and he lunged for the revolver. Defendant did not know why he had yelled when there was no one else in the house. Verdugo was not in the house. Defendant grabbed the revolver with his left hand and struggled with Aniceto. Aniceto fell onto the bed and defendant hit him on the head with his right fist. Aniceto stood up and defendant hit him in various other places. Defendant's bare hand broke Aniceto's skin. Once defendant got

the revolver, he did not continue to hit Aniceto. Defendant never drew his own semiautomatic gun. He always carried the gun on his body in a belt clip or a body strap. He even slept and showered with it.

Defendant asked Aniceto where Priscilla's money was and he answered, "In the wallet." He directed defendant to his back pocket and defendant took the wallet out. He took the wallet so he could get Priscilla's money from Aniceto. Aniceto owed her the money. As defendant walked down the hallway, he saw Fernando in a doorway. Defendant pointed his finger at him and told him to get back in his room. Defendant pointed with his left hand; Aniceto's revolver was now in his right hand and he left with it. He felt that when Aniceto pointed the revolver at him, he was permitted to take it to save his life. He did not consider his taking of the revolver to be stealing. Defendant had never seen Verdugo in the house, and when defendant got back in the truck, he did not give the wallet to Verdugo. He put the wallet and the revolver in his truck door pocket. Defendant did not tell Corina and Verdugo what had happened. Verdugo was falling asleep in the truck because he had been up all night drinking. He was "pretty much out of it."

When they got back to the shop, defendant threw Aniceto's wallet on the table and went to lie down. He never gave the wallet to anyone to return to Aniceto. Although he felt Priscilla had set him up to be killed by Aniceto, he still met her a few hours later at the drive-in and gave her \$400. But he was upset with her.

Defendant testified that Detective Eaton made no promises to him, but Detective Andrews told him he would get a lesser charge if he admitted something else. Detective Andrews did not talk to him about any deals for Verdugo. Defendant felt pressure during the interview because Detective Andrews mentioned a 25-year-to-life sentence and several charges. Also, defendant had been placed in the part of the jail that housed murderers.

Defendant testified that he was not afraid of Verdugo. He had been a friend. But defendant admitted telling Detective Andrews that he might get hurt if he revealed Verdugo's name.

Defendant believed Corina had lied or been mistaken in her testimony because she was protecting him, but he did not think she lied to protect Verdugo.

Verdugo

Verdugo testified that he was arrested on January 24, 2007 on an unrelated matter. In late February 2007, he was interviewed by Detective Andrews. Verdugo admitted that in that interview he failed to identify defendant in a photograph as someone he knew, although they were friends. He also failed to identify Corina as someone he knew. He did not know anything about the robbery and he figured it was none of his business. He wanted no part of it. All he had ever done was partied at defendant's house. Verdugo had never spoken to Priscilla outside of a courtroom.

Verdugo often asked defendant for a ride home, but he did not recall stopping at Aniceto's house on the morning of December 2, 2006. He did not recall parking in front of a house with children and other people coming in and out. Verdugo never agreed to participate in a robbery. He had never had a gun. Defendant never threw a wallet in his lap. Verdugo did remember defendant starting to take him home, then turning around and going back to the shop. There was no one in this world who could say that Verdugo was with Priscilla at any time. Verdugo continued visiting defendant's house until Verdugo was arrested in February. He had never seen defendant sell drugs. Verdugo had been nicknamed Negro by his mother due to his dark complexion; everyone called him that. Everything Verdugo testified to was the truth.

On cross-examination, Verdugo agreed that there was in fact someone in this world who could say he was with Priscilla because defendant had said exactly that when Detective Andrews interviewed him. Verdugo agreed that he lied to Detective Andrews during his own interview. He lied when he said he did not know defendant or Corina.

He had been to their house repeatedly and had been friends with defendant since 2000 or 2001. Verdugo had no problems with defendant and Verdugo did not know why either defendant or Corina would make up a story that implicated him in a crime. Defendant probably knew that Verdugo would be mad if he was implicated in something he had nothing to do with.

Verdugo testified that he was sometimes called Black Dog, although he mainly went by Negro.

Verdugo did not know Fernando, and he did not know why he would make up the story of seeing Verdugo at Aniceto's house on December 2, 2006.

Rebuttal

Detective Andrews

Detective Andrews testified that on February 26, 2007, he introduced himself to defendant while he was in a holding cell. Detective Andrews told him he wanted to talk to him about the case. Detective Andrews made no statements to defendant as he escorted him to an interview room. Detective Andrews never talked to defendant about facing a 25-year-to-life sentence or spending the rest of his life in prison, never made any promises or threats to defendant, and he did not discuss the difference between a home invasion robbery and a murder.

The entire taped interview was played for the jury and the transcript was entered into evidence as an exhibit.

Ms. Cordis-Weaver

Ms. Cordis-Weaver, a self-employed independent private investigator, was contracted by defendant's counsel. When Cordis-Weaver interviewed Corina, Corina was hesitant, although in her report Cordis-Weaver described her as requiring coaxing. Corina told her that Verdugo was at the shop the day before the crime, and he had a firearm. Corina said she, defendant, and Verdugo drove to Aniceto's house, and Verdugo took his firearm. When defendant and Verdugo came out of Aniceto's house, Verdugo

was carrying two firearms. When defendant and Verdugo returned to the vehicle, Verdugo said he liked Aniceto's firearm and wanted to keep it.

On cross-examination, Cordis-Weaver said she thought Corina was protecting defendant during the interview.

Detective Eaton

Detective Eaton interviewed defendant regarding the homicide investigation after he waived his *Miranda* rights and agreed to speak. Eaton did not make any promises or threats to defendant. Nor did he suggest that if defendant pled to a different crime, he would be treated more leniently for another crime, including a homicide. Furthermore, Eaton had nothing to do with the charging of criminal cases. He also made no promises to defendant regarding his sentence and had no control over that matter. After their interview, defendant asked Eaton about the present case. Eaton said he did not know about it and had no information on it. Defendant asked if he had damaged himself by speaking with Eaton. Eaton said he would write down what defendant told him and forward it to the district attorney, but Eaton did not make any implied promises to defendant.

DISCUSSION

I. Instruction on Claim of Right Defense

Defendant contends the trial court was obligated to instruct sua sponte on the defense of claim of right because defendant believed the money he took from Aniceto was money owed to defendant for the car he obtained for Priscilla.

Defendant does not acknowledge, however, that a claim of right defense applies only to “forcible takings intended to recover *specific personal property* in which the defendant in good faith believes he has a bona fide claim of ownership or title,” but not to “robberies perpetrated to satisfy, settle or otherwise collect on a debt, liquidated or unliquidated.” (*People v. Tufunga* (1999) 21 Cal.4th 935, 956, italics added.) Here, the evidence suggested only that defendant was attempting to recover *money* he believed

Aniceto owed to him or Priscilla. Thus, the defense did not apply and the court had no duty to instruct on it.

II. Instruction on the Lesser Included Offense of Robbery

Defendant also contends the trial court erred by failing to instruct sua sponte on robbery as a lesser included offense of home invasion robbery. He argues that the evidence raised a question as to whether there were only two participants in the robbery (demonstrated by the jury's acquittal of Verdugo), rather than the three or more required for a home invasion robbery. We see no error here.

““In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.]”” (*People v. Moye* (2009) 47 Cal.4th 537, 548.) The instructions are required when there is substantial evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater offense, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

In this case, the trial court instructed the jury on count 1 with CALCRIM Nos. 1600 (robbery; § 211), 1601 (robbery in concert/home invasion robbery; § 213, subd. (a)(1)(A)), 1602 (robbery: degrees; § 212.5), 1603 (robbery: intent of aider and abettor), and 1800 (grand theft as a lesser included offense; § 484), as well as some firearm enhancements. Thus, the court did instruct on robbery, and separately instructed on robbery in concert, which informed the jury it must find that defendant committed a robbery before it could find that he committed a robbery in concert. Accordingly, the jury found that defendant committed a robbery, and then separately found that he did so while acting in concert with two or more other people. In addition, the jury was given the

grand theft alternative if it determined defendant did not commit robbery in concert with two or more other people. No instructional error has been shown.

III. Inconsistent Verdicts

Lastly, defendant maintains that the jury's acquittal of Verdugo created inconsistent verdicts that require defendant's acquittal as a matter of law. He explains that by acquitting Verdugo, the jury conclusively determined that only defendant and Priscilla participated in the home invasion robbery—which by definition required *two or more* other participants. The People counter that inconsistent jury verdicts do not require reversal, and that even if the jury found that Verdugo was not involved in the home invasion robbery, overwhelming evidence nevertheless showed that Corina was involved, thereby fulfilling the element that two or more other people participated in the crime. Defendant correctly notes that the information alleged the participation of Verdugo and Priscilla, *not* Corina, and the prosecution similarly based its case on the participation of Verdugo and Priscilla. Again, we find no error.

“It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand.” (*People v. Lewis* (2001) 25 Cal.4th 610, 656; *United States v. Powell* (1984) 469 U.S. 57, 67; *People v. Palmer* (2001) 24 Cal.4th 856, 860-861 (*Palmer*).) But defendant asserts there is a limited judicial exception when all the essential elements of the crime the defendant was acquitted of are identical to the essential elements of the crime of which the defendant was convicted. (*People v. Hamilton* (1978) 80 Cal.App.3d 124, 130, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481.) This occurs “where a conspiracy count alleges as the only overt act a crime set forth specifically in another count, and the defendant is found not guilty of the specific crime, but is found guilty of conspiracy; such an inconsistency invalidates the conspiracy conviction. [Citations.]” (*Ibid.*)

This exception did exist in the past, limited in application to conspiracy cases (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1657-1660), but the Supreme Court has

since rejected a rule requiring consistent verdicts (*People v. Lewis, supra*, 25 Cal.4th at p. 656; *Palmer, supra*, 24 Cal.4th at pp. 864-865). *Palmer* is particularly instructive to present case. There, the defendant argued that because it takes at least two people to conspire, the verdict acquitting his only alleged coconspirator was inconsistent with his own conviction for the same conspiracy. (*Palmer, supra*, at p. 860.) The Supreme Court agreed that the verdicts were inconsistent, but concluded they could both be given effect. (*Ibid.*)

First, the court noted the general rule: “The law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence.” (*Palmer, supra*, 24 Cal.4th at p. 860.) The court explained: “The United States Supreme Court has embraced this general rule. ‘Inconsistency in a verdict is not a sufficient reason for setting it aside. We have so held with respect to inconsistency between verdicts on separate charges against one defendant, [citation], and also with respect to verdicts that treat codefendants in a joint trial inconsistently, [citation].’ [Citation.] California law is similar. ‘An acquittal of one or more counts shall not be deemed an acquittal of any other count.’ [Citations.] ‘The fact that certain defendants may escape conviction for their crimes is not any legal or logical reason why another defendant, where substantial evidence has been introduced to sustain his conviction, should be exonerated and be permitted to escape punishment for his crime.’ [Citation.] Accordingly, ‘The general rule is that acquittal of one codefendant normally will not require acquittal of another.’ [Citation.]” (*Id.* at pp. 860-861.)

The defendant in *Palmer* raised an exception to this general rule: “‘When two or more alleged coconspirators are jointly tried, it is generally held that acquittal of all persons with whom a defendant is alleged to have conspired precludes conviction of the remaining defendant. This result is compelled by the rule of consistency of verdicts

because, as Justice Cardozo once noted, “It is impossible in the nature of things for a man to conspire with himself.” [Citation.]” (*Palmer, supra*, 24 Cal.4th at p. 861.)

The *Palmer* court responded that “[i]n the last two decades, the trend has turned against the rule of consistency, largely due to high court decisions involving inconsistent verdicts generally. In *Standefer v. United States* (1980) 447 U.S. 10 (*Standefer*), the petitioner was convicted of aiding and abetting a crime despite the fact that the alleged actual perpetrator, Niederberger, had previously been acquitted of that crime in a different prosecution. Relying on the doctrine of nonmutual collateral estoppel, the petitioner argued that the prior acquittal precluded the government from relitigating the question of the actual perpetrator’s guilt. The high court disagreed. It noted that a jury has the power, if not the legal right, to acquit no matter what the evidence, and the prosecution may never challenge such an acquittal. This circumstance ‘in criminal cases permits juries to acquit out of compassion or compromise or because of ““their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.”’ [Citation.]’ [Citation.] ‘In denying preclusive effect to Niederberger’s acquittal, we do not deviate from the sound teaching that “justice must satisfy the appearance of justice.” [Citation.] This case does no more than manifest the simple, if discomfoting, reality that “different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.” [Citation.] While symmetry of results may be intellectually satisfying, it is not required. [Citation.] [¶] Here, petitioner received a fair trial at which the Government bore the burden of proving beyond reasonable doubt that Niederberger violated [the statute] and that petitioner aided and abetted him in that venture. He was entitled to no less—and to no more.’ [Citation.]” (*Palmer, supra*, 24 Cal.4th at pp. 862-863.)

“A year after *Standefer*, the [United States Supreme Court] upheld inconsistent verdicts by a trial judge sitting without a jury. [Citation.] Then, in 1984, it considered a case in which a single jury inconsistently found a single defendant guilty of some counts

and not guilty of others. [Citation.] Reaffirming [an] earlier decision ..., the court gave effect to all the verdicts, including those of guilty that were irreconcilable with those of not guilty. It noted that prior decisions ‘establish “the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons,”’ and that ‘inconsistencies often are a product of jury lenity.’ [Citation.] ‘The fact that the inconsistency may be the result of lenity, coupled with the Government’s inability to invoke review, suggests that inconsistent verdicts should not be reviewable.’ [Citation.] The court rejected ‘a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury’s deliberations that courts generally will not undertake.... [W]ith few exceptions [citations], once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury’s collective judgment. Courts have always resisted inquiring into a jury’s thought processes [citations]; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.’ [Citation.]” (*Palmer, supra*, 24 Cal.4th at p. 863.) “[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts.”” (*Ibid.*)

The *Palmer* court concluded: “In the wake of these decisions, numerous federal courts have reconsidered and rejected the rule of consistency. [Citations.] Others have questioned the rule in light of these cases but not decided its continuing validity. [Citations.] [¶] We too believe the rule of consistency should be reconsidered. The general rationale behind the rule has been ‘that one may not conspire with himself.’ [Citation.] It does take at least two to conspire. But to go ‘[f]rom this irrefutable proposition’ to a rule requiring reversal of the inconsistent verdict is a ‘precipitous leap.’

[Citation.] We find the federal decisions persuasive and, like the high court, conclude that we may accept inconsistent verdicts. We agree with the conclusion of the Eleventh Circuit Court of Appeals: ‘Consistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand.’ [Citation.] [¶] Our criminal justice system, which permits a conviction only if the jury unanimously finds beyond a reasonable doubt that a defendant is guilty of the particular charge, gives the defendant the benefit of the doubt. Moreover, a jury clearly has the unreviewable *power*, if not the right, to acquit whatever the evidence. An inevitable result of this system, and one that society accepts in its quest to avoid convicting the innocent, is that some criminal defendants who are guilty will be found not guilty. This circumstance does not, however, mean that if one person receives lenient treatment from the system, all must. ‘[I]t is always possible for a jury to exercise lenity and acquit some of the defendants while convicting others who are in fact no more guilty, and when this happens the convicted defendants have no remedy. [Citations.] Such incongruities are built into the American system of criminal justice and can have no weight in our decision whether to reverse the denial of a new trial to the present defendants.’ [Citation.] ... [The defendant’s] verdict must stand or fall on its own merit, not in comparison to [his coconspirator’s].” (*Palmer, supra*, 24 Cal.4th at pp. 864-865; *Harris v. Rivera* (1981) 454 U.S. 339, 345 [inconsistency in a verdict is not a sufficient reason for setting it aside].)

Applying *Palmer* to the present case, we believe that if consistent verdicts are not necessary in conspiracy cases (where the participation of at least two people is required), they are not necessary in home invasion robbery cases (where the participation of at least three people is required). Here, there was substantial evidence that defendant, Verdugo, and Priscilla participated in the home invasion robbery. Thus, defendant’s verdict stands on its own merit.

DISPOSITION

The judgment is affirmed.

Kane, J.

WE CONCUR:

Gomes, Acting P.J.

Hill, J.